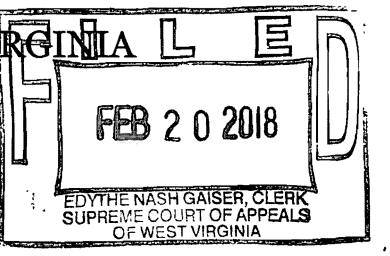
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 18-0034

STATE OF WEST VIRGINIA EX REL.
SCOTT R. SMITH, PROSECUTING ATTORNEY, OHIO COUNTY,

Petitioner,

v.

THE HONORABLE DAVID J. SIMS,
JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, AND
DALLAS MICHAEL ACOFF,

Respondents.

RESPONDENT, DALLAS MICHAEL ACOFF'S, RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Petition for a Writ of Prohibition to
the Circuit Court of Ohio County, West Virginia,
Honorable David J. Sims, Judge
Circuit Court Case No. 16-F-43

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III. QUESTIONS PRESENTED.

1). Whether the Defendant acted diligently when he was unsuccessful in locating and interviewing Norman Banks, an out-of-state material witness, after the State indicated to Defendant's counsel following its discovery disclosure that the Cleveland, Ohio address for Mr. Banks reflected in that disclosure was no longer any good, when State agents related to Defendant's counsel that Mr. Banks would not be attending trial, and when Mr. Banks, himself, later testified that he was affirmatively avoiding being located by anyone.

2). Whether the trial court properly concluded that the testimony of Norman Banks would have had a materially different outcome on the case when it found that Mr. Banks, a shooting victim, himself, named in one count of the subject indictment, was an eyewitness to both the shooting of the decedent and himself, when Mr. Banks named a third party as the actual shooter, and when Mr. Banks' testimony exonerated Defendant as the perpetrator of the subject homicide and malicious assault convictions.

IV. COUNTERSTATEMENT OF THE FACTS OF THE CASE.

Petitioner's recitation of facts and the procedural history herein is generally accurate, although it omits some critical facts or otherwise understates and glosses over salient facts necessary to the disposition of the instant questions. Accordingly, in conformity with Rule 16(g), Rev. R. App. P., Respondent has sought to amplify and clarify the facts developed below and otherwise correct such errors and omissions where necessary.

Facts developed at trial:

On October 9, 2015, Lemroy Coleman was a patron at the American Legion social club and bar (hereinafter, "the Legion") located at the intersection of Fifteenth and Jacob Streets in the City of Wheeling, Ohio County, West Virginia. Present also at the Legion were both the Respondent, Mr. Acoff, and Norman Banks. App. Vol. 2 at p. 7. A verbal altercation arose between Mr. Coleman and Respondent, and the two exchanged

words. At some point, Messers. Coleman and Banks exited the Legion and Respondent followed. *Id.* at p. 8.

Messrs. Coleman, Banks, and Respondent began exchanging gunfire. *Id.* at p. 9. Messrs. Coleman and Banks ran in the westerly direction on Fifteenth Street toward what is known as "Lane E," the first one located to the left of the Legion on Fifteenth Street heading in the westerly direction. *Id.* at p. 10. Petitioner asserts in its factual statement (*see Petition* at pp. 1, 3, and 4) that it was at this point that Mr. Coleman was shot, *i.e.* in front of the Legion, and suggests that this fact is supported by (a) the surveillance video in front of the Legion reflecting (App. Vol. 7) the exchange of gunfire, (b) Mr. Acoff's admission that he shot at Messrs. Coleman and Banks, and the purported elevated position from which Mr. Coleman was shot (App. Vol. 5 at p. 209).

While that assertion is a certainly a plausible one based upon those facts, the evidence hardly established it to the mathematical certainty that Petitioner seems to suggest that it did and fails to address other telling facts absent from the record that would undermine such a conclusion. For example, while Petitioner asserts that both Messrs. Coleman and Banks were shot on Fifteenth Street, no evidence was offered at trial of any blood drops, blood spatter, or blood trails identified on Fifteenth Street leading away from where the State maintained they were shot leading into Lane E where Mr. Coleman's body was located. As well, Petitioner seeks to characterize surveillance video showing Mr. Coleman "lurch or stagger" after Respondent fires his gun. *Petition* at pp. 4-5, *citing* App. Vol. 7 at 13 (DVD 11:36-38. Petitioner notes that this argument was advanced at trial by the State; however, Petitioner also candidly notes that alternative explanations for Mr. Coleman's conduct other than that he was being shot were also advanced at trial. *Id.*

Petitioner wholly omits in its statement of the case the fact that fifteen (15) feet up Lane E where Mr. Coleman was found and around the corner from where Mr. Acoff was discharging his firearm, a discharged 9 mm round was recovered that was ballistically matched to the low velocity round recovered from Mr. Coleman's body as the fatal shot. App. Vol. 5 at p. 68. Stated otherwise, a smashed bullet fired from the same gun that killed Mr. Coleman was found next to his body in Lane E fully fifteen (15) feet up the Lane that runs perpendicular to Fifteenth Street. App. Vol. 3 at p. 243-244.

Petitioner also fails to note that a high velocity spent shell casing (and no low velocity shell casing(s)) was recovered from the area where Respondent was firing his weapon and that the round recovered from Mr. Coleman's body was discharged from a low velocity shell. While it is accurate to note that the disparity in the type of shell casing recovered from where Respondent was firing a weapon (high velocity) and the bullets recovered from Mr. Coleman's body and lying next to his body (low velocity rounds) does not definitively disprove that the fatal slug was not shot by Respondent's gun, evidence was developed at trial that bullets usually are loaded from the same boxes of ammunition such that the velocity of rounds in a gun are not ordinarily mixed and matched.

Petitioner also notes that two (2) Tul Ammo 9 mm shell casings (described as having looked weathered) were located north of Alley 11 in Lane E. Petitioner suggests that the shells must necessarily have been there for some time prior to the subject shooting, because the shell casings had lost their luster and looked "weathered." *Brief* at p. 5 *citing* App. Vol. 2 at p. 263. However, Petitioner fails to note that the presence of these shell casings was never explained beyond speculation by police officers at trial that East Wheeling is a high crime area. *Id.* Beyond the anecdotal implication that the Tul

Ammo shell casings found in Lane E north of Alley 11 was from an unrelated shooting, no expert opinion evidence was offered by the State to the effect that the casings had been exposed to the weather for any time or had even been there at all prior to October 9, 2017.

Testimony of Martin Sheehan, Respondent's trial counsel:

On the critical issue of whether Respondent's trial counsel, Martin Sheen, made adequate efforts to locate and secure the attendance of Mr. Banks at trial, Petitioner asserts that

> Defendant made no attempt to contact Banks at the address provided by the State – an address which was unequivocally a "good" address for purposes of making contact with Banks. In fact, Defendant's trial counsel made little to no effort to locate Banks and secure his trial attendance, failed to pursue available methods to secure his attendance, and failed to instruct his investigator to try to locate Banks,

Brief at p. 15. *See, too, Brief* at p. 10.

However, Petitioner fails utterly to mention ***why*** Mr. Sheehan made no efforts to reach Mr. Banks at the address disclosed by the State in its initial discovery disclosure, a fact well-developed at the underlying evidentiary hearing and one of which the circuit court took note in its ruling. App. Vol. 2 at pp. 18-19. As the testimony revealed at the evidentiary hearing on the renewed motion for new trial, the State made its initial discovery disclosure on May 19, 2016, and included on its witness list was the name "Norman Banks," who purportedly resided at 9200 Denison Street, Cleveland, Ohio. App. Vol. 1 at p. 14.

Subsequent to the prosecution filing its initial discovery disclosure, Mr. Sheehan met with Wheeling Police Detectives Gregg Harris and Robert Safreed and Assistant Prosecuting Attorney Shawn R. Turak in August, 2016, to review physical evidence, and it was during this meeting, or during a separate conversation with Assistant Prosecutor

Turak, *that Mr. Sheehan was notified that the police were unaware of Mr. Banks' whereabouts and "didn't have a current handle on him."* App. Vol. 2 at p. 89. Mr. Sheehan testified that he wanted to interview Mr. Banks, a named "victim" in count three of the indictment. App. Vol. 1 at p. 8.

However, in reliance on the information supplied by the police and/or prosecutor to the effect that the address previously supplied by the prosecution regarding Banks' location was not longer any good, Mr. Sheehan, on September 21, 2016, filed Respondent's witness disclosure naming, *inter aliis,* Norman Banks, but indicating on the disclosure that his address was "unknown." App. Vol. 1 at p. 246.[1]

Petitioner otherwise fails to identify in the record Mr. Sheehan's testimony concerning the numerous affirmative efforts he made to locate Norman Banks despite his belief, engendered by the prosecution, itself, that he had no good address for him. Specifically, Mr. Sheehan testified that on September 1, 2016, Mr. Sheehan created a "to do" list, which list included witnesses to be interviewed; one such individual was a Megan Brak, who apparently knew people who knew Mr. Banks. App. Vol. 2 at pp. 93-97. Ms. Brak eventually supplied Mr. Sheehan with a cell phone number purportedly belonging to Mr. Banks. App. Vol. 2 at p. 101. Mr. Sheehan did not know for a fact that the phone number supplied by "Megan" belong to Mr. Banks, but it was the best number that he had based upon the information supplied to him. Tr. at pp. 101-102.

As was established at the subject evidentiary hearing, Mr. Sheehan sent several text messages to the phone number he believed may have belong to Mr. Banks as

[1] Apparently, the prosecution took no issue with Mr. Sheehan's under-oath account of having been told by the assistant prosecutor and/or law enforcement officers that Mr. Banks' whereabouts were unknown inasmuch as no effort was made at the August, 2017, evidentiary hearing to impeach Mr. Sheehan in relating this version of events.

supplied by "Megan," soliciting an interview, but he never heard back from the person to whom the number belonged. App. Vol. 2 at p. 101.

Mr. Sheehan's efforts did not end there. He interviewed Cordell Coleman, who suggested that Mr. Banks might be located in the vicinity of 99th and Denison Streets in Cleveland, Ohio. App. Vol. 2 at p. 103. However, Mr. Sheehan concluded that, given the vague description of Mr. Banks' purported location in an inner-city Cleveland neighborhood, the lead on Mr. Banks' whereabouts as reported by Cordell Coleman was "too nebulous" to follow up on. App. at Vol. 2 at pp. 105-106.

Testimony of Norman Banks, shooting victim and eyewitness:

Norman Banks, a named victim in Count Three of the underlying Indictment returned against Respondent and charging him with malicious assault, never testified at trial. Mr. Banks was interviewed briefly by the police at the police station and afterwards at the hospital, although he never gave a signed or sworn statement to the police. As Lt. Prager testified at trial, Mr. Banks, in a state of excitation, stated, "*They're* going to kill me." App. Vol. 3, p. 60. This account squares entirely with Mr. Banks' testimony at the evidentiary hearing in which he related that he told the police, "I think *they* killed him. * * * Help him first, because I think *they* killed him." App. Vol. 2, pp. 22-23; 36.

Importantly, Banks never identified to law enforcement on the night of the shooting (the only night that he ever gave any statement to the police or anyone else) who the shooter was. App. Vol. 2 at pp. 155-156; 163. Law enforcement officers noted that Mr. Banks had given multiple versions of what transpired, although they conceded that his extreme reluctance to relate what occurred was motivated out of fear and a desire to not be involved. *Id.* at p. 167.

Petitioner contends that Mr. Banks testified "unequivocally" that he could always be reached at 9200 Denison Street in Cleveland, Ohio, his sister's residence since 2012. App. Vol. 2, pp. 37-38. That contention, while somewhat accurate, overstates Mr. how accessible Mr. Banks actually was and neglects entirely to mention that he did not reside there. Indeed, he testified that he did not stay with his sister upon his return to Cleveland, as he was fearful that "somebody was coming after [him]." App. Vol. 2, pp. 24-25. He "would bounce from place to place" and at one point he stayed in a homeless shelter. *Id.* at p. 25. He testified that he did not want to come to Wheeling to testify, because he was "scared" and "terrified." App. Vol. 2, p. 27. As well, in a remarkable admission against his own penal interests as a convicted felon, he acknowledged that his reluctance to come forward was motivated, in part, by a desire to avoid prosecution in his own right for possessing and discharging a firearm. App. Vol. 1, p. 281.

Testimony of Jerome Saunders, named by Norman Banks as the actual shooter:

Jerome Saunders was named by Norman Banks as the individual who actually shot him and the decedent, Lemroy Coleman. App. Vol. 2 at p. 16. Mr. Saunders testified that he was not the shooter and that, in fact, he was nowhere near the American Legion when both Messrs. Banks and Coleman were shot. App. Vol. 2 at p. 179. However, Mr. Saunders, who was incarcerated at the time of his testimony, acknowledged that he had, in fact, just been convicted of unlawful assault as a lesser offense of wanton endangerment with a firearm for discharging a firearm. Mr. Saunders conceded that he would be prosecuted for murder if he admitted to having shot Mr. Coleman and stood to be prosecuted as a recidivist as a multi-felony offender. *Id.* at pp. 180-181.

V. SUMMARY OF ARGUMENT.

This case represents an extraordinary circumstance where not only an actual eyewitness to a homicide who did not testify at trial subsequently offers evidence fully exonerating the accused, but was himself a victim named as such in the indictment and was shot in the company of the decedent.

As the circuit court below found, Respondent's trial counsel made reasonable efforts to locate and interview the witness, Norman Banks, but his efforts in this regard were frustrated by the undisputed facts that he was informed that the address previously supplied by the State was not good, that the witness was located out-of-state, that the witness had no permanent or fixed address, that the witness resided periodically in homeless shelters, and that the witness was affirmatively avoiding being found by either the prosecution or the defense.

As well, the circuit court properly found that the evidence of Norman Banks was new evidence that would have had a material outcome on the trial of the matter had the evidence been offered.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that, upon an application of the criteria set forth in Rules 16(d)(6) and 18(a)(4), W. Va. Rev. R. App. P., although the facts and legal arguments are adequately presented in this brief and accompanying Appendix, this Court's decisional process would be significantly aided by oral argument. Specifically, Petitioner maintains that a Rule 20, W. Va. Rev. R. App. P., is warranted, because the underlying issue implicates an issue of fundamental public importance, *i.e.* whether an individual is

entitled to a new trial based upon after-acquired evidence in the form of the eyewitness testimony of a victim named in the indictment. Accordingly, Petitioner's counsel believes that oral argument is necessary to fully air out the issues raised herein and would aid this Court in reaching the proper conclusion that a new trial is warranted.

VII. POINTS AND AUTHORITIES OF LAW AND ARGUMENT

A. Standard of Review.

A writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1 [2010]. *See, too* Syl. Pt. 1, *State ex rel. Charleston Mail Ass'n v. Ranson,* 200 W.Va. 5, 488 S.E.2d 5 (1997).

In prescribing the standards for issuing a writ of prohibition, this Court has has held that

> [i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

As in the matter *sub judice*, where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was . . . deprived of a valid conviction. Syl. Pt. 2, *State ex rel. Games-Neeley v. Silver*, 236 W.Va. 387, 780 S.E.2d 653 (2015), *quoting* Syl. pt. 2, in part, *State ex rel. Sims v. Perry*, 204 W. Va. 625, 515 S.E.2d 582 (1999).

This Court has further held that

> [i]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640535 S.E.2d 484 (2000).

This Court has enumerated the prerequisites that must be satisfied in order for a new trial to be granted:

> "'A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his [or her] affidavit that [the defendant] was diligent in ascertaining and securing [the] evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.' Syl. pt. 1, *Halstead v. Horton*[,] 38 W.Va. 727, 18 S.E. 953 (1894)." Syllabus, *State v. Frazier*, 162 W. Va. 835, 253 S.E.2d 534 (1979).

Syl. Pt. 2, *Antsey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

As Petitioner correctly notes, "'[a] new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special.'" Syl.Pt. 2, *State v. King*, 173 W. Va. 164, 313 S.E.2d 440

(1984) (*per curiam*), *quoting* Syl. Pt. 9, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966). However, this Court has also noted that "[t]he question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court." *King*, 173 W. Va. at 165, 313 S.E.2d at 442, *citing State v. Nicholson*, 170 W.Va. 701, 703, 296 S.E.2d 342, 344 (1982).

B. The Circuit Court Properly Concluded that Respondent Was Diligent in Attempting to Locate and Interview Norman Banks.

Petitioner, citing to a host of authorities and sources concerning the definition of "reasonable diligence," pays lip service to the deference to be accorded to a circuit court in reaching an evidentiary determination on whether the *Frazier* standards has been satisfied and then effectively appears to ignore that standard in second guessing the findings and conclusions and reached by the circuit court below. In this forest of verbiage, the entirety of Petitioner's argument concerning its "reasonable diligence" argument is found only at pp. 20 and 21 of its *Brief*.

The entire thrust of Petitioner's "reasonable diligence" argument, *i.e.*, that the circuit court erred in concluding that Respondent made reasonable efforts to locate and interview Mr. Banks, rests on its supposition that Respondent was, in fact, furnished with Mr. Banks' correct address, 9200 Denison Street in Cleveland, Ohio, in the State's initial discovery disclosure. *Brief* at p. 20. Petitioner further asserts that Banks testified that he could "always" be reached at that address and responded to a "subpoena" that had been mailed to him at that address. Accordingly, Petitioner concludes, the circuit court erred in its determination that Respondent did not have a good address for Mr. Banks. *Id.*

Maddeningly, however, Petitioner altogether ignores that uncontested fact that Respondent's trial counsel was notified by the police and/or the

assistant prosecutor, Shawn Turak, *following the State's discovery disclosure*, that the police did not know where Norman Banks was. App. Vol. 2 at p. 89. As the following colloquy reflects, this fact was established by Mr. Sheehan's testimony at the evidentiary hearing conducted on August 8, 2017.

> Q. Okay, and what were you notified of [by police officers or Assistant Prosecutor Turak during your meeting with them to review evidence] concerning Mr. Banks and his availability or willingness to testify at trial?
>
> A. That the police didn't know where he was. They didn't have a current handle on him.

App. Vol. 2 at p. 1 (erroneously dated August 8, 2016 on the cover page).[2]

Even more tellingly, Respondent's witness disclosure filed on September 21, 2016, reflects that Mr. Banks was a defense witness, but that his address was "unknown." App. Vol. 1 at p. 246. *Absolutely no plausible fact accounts for Respondent listing Mr. Banks' address as "unknown" on his September 21, 2016, witness disclosure other than that prosecution or its agents notified Respondent's counsel in August, 2016, that the prosecution did not know where Mr. Banks was.* Stated otherwise, Respondent's witness disclosure objectively reinforces Mr. Sheehan's testimony at the evidentiary hearing that he was notified by the police that they did not know where Mr. Banks was, *i.e.* that the address for Mr. Banks previously furnished by the State in its discovery disclosure was no longer any good.

Moreover, Mr. Sheehan labored under the reasonable belief that the State wanted Mr. Banks to appear at trial, especially because Mr. Banks was an actual victim in the case.

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[2] Tellingly, the State made no effort whatsoever to contradict or impeach Mr. Sheehan's testimony in this regard at the evidentiary hearing or subsequently. Thus, Mr. Sheehan's evidence that he was notified by the police and/or Assistant Prosecutor Turak that the prosecution did not know where Mr. Banks was as of August, 2016, stands unchallenged in the record.

App. Vol. 2 at p. 129. And Mr. Sheehan concluded that if the State, with the resources available to it, could not find Mr. Banks, there was little reason for him to conclude that he could. *Id.* at pp. 129-130.

Petitioner correctly notes that a criminal defendant has the right to rely upon the State's discovery responses for purposes of evaluating the second prong of the *Frazier* "due diligence" standard. *Id., citing State v. William M.*, 225 W. Va. 256, 262, 692 S.E.2d 299, 305 (2010). Respondent could not agree more. While the State did not file a formal amendment to its initial discovery disclosure reflecting its apparently honestly held belief that it did not know where Mr. Banks was, *i.e.*, that the 9200 Denison Avenue address was no longer good, it is unrefuted in the record that Respondent was advised by Petitioner and its agents in August, 2016, that it did not know where Mr. Banks was.[3]

Based upon the "circumstances of the case," *King*, 173 W. Va. at 165, 313 S.E.2d at 442, it was certainly reasonable for Respondent to conclude, based upon a belief engendered by the prosecution, that he lacked a valid address for Mr. Banks. Once this proposition (utterly ignored by Petitioner in its *Brief* but relied upon heavily by the circuit court it its Order at pp. 286-287; 292) is accepted, the balance of Petitioner's argument that Mr. Sheehan failed to exercise reasonable diligence in locating Mr. Banks crumbles. For example, that the prosecution mailed what it later attempted to characterize as a "subpoena" to Mr. Banks at the Denison Avenue address (although no subpoena, only a

[3] The record reflects Mr. Sheehan's extensive struggles in locating an investigator to assist Respondent despite his earnest efforts to do so, and, despite having been appointed to represent Respondent on May 16, 2016, App. Vol. 1 at p. 1, it was not until August, 2016, that he succeeded in obtaining the services of Thomas Burgoyne to serve in that capacity. App. Vol. 2 at pp. 81-86. Thus, Mr. Sheehan was informed that Mr. Banks' whereabouts were unknown nearly contemporaneously with his retention of an investigator.

praecipe, was introduced into evidence, App. Vol. 2 at p. 71) has no bearing on what was reasonably believed to be true by Mr. Sheehan based upon what the prosecution and/or police had represented to him concerning the Denison Avenue address no longer being valid.[4]

As to what Mr. Sheehan actually *did* in his efforts to locate Mr. Banks, the record reflects that he interviewed at least two (2) witnesses, Megan Brak and Cordell Coleman. Mr. Sheehan believed that Ms. Brak was in touch with individuals who were in touch with Mr. Banks, and she supplied Mr. Sheehan with what he believed was a cell phone contact number for Mr. Banks. App. Vol. 2 at pp. 99-101. Mr. Sheehan attempted to reach Mr. Banks by telephone on several occasions and eventually resorted to texting him. *Id.* at p. 101. His efforts to reach Mr. Banks via telephone met with no success. *Id.*

Mr. Sheehan also interviewed Cordell Coleman, who had represented to Mr. Sheehan that he had some general information concerning Mr. Banks and his whereabouts. *Id.* at p. 103. However, the information given by Mr. Coleman, that Mr. Banks was located around "99th and Denison" in Cleveland, a low-income, inner city neighborhood, was simply too vague an address to warrant following up. *Id.* at p. 103-106.

Summarily, the circuit court concluded that, despite not having a good address for Mr. Banks, Mr. Sheehan did not desist in his efforts to locate him. App. Vol. 2 at p. 287-288. The Court ultimately concluded based upon the foregoing facts that "Sheehan

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[4] Although it is certainly beneficial to Respondent's argument that Mr. Banks did not reside continuously at his sister's Denison Avenue address, was affirmatively seeking to avoid being found and had, in fact, been residing for a time in a homeless shelter, App. Vol. 2 at pp. 24-25, these considerations have no direct bearing whether of Mr. Sheehan was reasonably diligent

made a diligent effort under the circumstances to locate Banks, interview him, and, presumably, identify the evidence exculpating [Respondent] and secure the attendance of Banks at trial." App. Vol. 2 at p. 292.

Thus, extending to the circuit court the discretion its due, *King*, 173 W. Va. at 165, 313 S.E.2d at 442, the circuit court properly concluded, based upon an objective assessment of the record and in light of the evidence available to Respondent, that the "reasonable diligence" prong of the *Frazier* prong was satisfied. Upon concluding that the circuit court's order is not clearly erroneous as a matter of law, Syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12, the writ prayed for should be denied.

C. The Circuit Court Properly Concluded that the After-Acquired Evidence in the Form of the Testimony of Norman Banks Would Have Produced a Different Result at Trial.

Petitioner next contends that, even if this Court were to find that Respondent's efforts to locate and secure the attendance of Mr. Banks at trial were adequate, a writ should issue nevertheless, because "evidence of Defendant's guilt was compelling and the Defendant already produced and advanced a theory that a third-party shooter committed the murder. *Brief* at p. 22. Petitioner further contends that, contrary to the circuit court's conclusion, the after-discovered evidence does not "explain unexplained evidence" or otherwise serve as a "'gap-filler'" to plug holes in Respondent's case. *Id.* These contentions are both outrageous and patently without foundation.

While it is certainly true that Respondent advanced the theory of a third-party shooter at trial, including through hearsay statements purportedly made by Mr. Banks offered through third parties, the immutable fact remains that: (1) Mr. Banks never offered a written or recorded statement; (2) any statements that Mr. Banks purportedly

made to third parties were never reviewed, signed, or adopted by him; and (3) Mr. Banks testified under oath, for the first time, without equivocation, that he and Mr. Coleman were shot by Jerome Saunders in the Lane running perpendicular to Fifteenth Street. ***These facts are uncontradicted.*** Efforts by Petitioner to muddy up Mr. Banks as a convicted felon who was taking a muscle relaxer that night do not militate against his unequivocal testimony that Jerome Saunders, himself a convicted felon prone to discharging firearms in the direction of human beings, was the individual who shot and killed Mr. Coleman and shot Mr. Banks.

Apparently, Petitioner confuses the idea of a *theory* of a third-party shooter in lane behind the Legion with the after-acquired *facts* offered through Mr. Banks that support that theory. The third and fourth prongs of the *Frazier* standard, *i.e.*, that the evidence must be "new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point[; and] . . .[t]he evidence must be such as ought to produce an opposite result at a second trial on the merits," Syl. Pt. 2 (in part), *Antsey*, 237 W. Va. 411, 787 S.E.2d 864, are more than amply satisfied through Mr. Banks' testimony.

Certainly, the theory of a second shooter was established circumstantially at trial, but the trial jury lacked the benefit of the facts of Mr. Banks' substantive testimony offered at the August 8, 2017, evidentiary hearing, wherein Mr. Banks affirmatively testified (as the only eyewitness to testify in any of these proceedings as to the actual shooting) that he and Mr. Coleman were shot in Lane E. App. Vol. 2 at pp. 16-18. Given the surrounding facts, facts upon which the circuit court relied in reaching its conclusion that a different result would obtain, *e.g.*, that a bullet fired from the same gun as the one that killed Mr. Coleman was found next to him – *fifteen feet up Lane E*, that the round

that killed Mr. Coleman was fired from a low velocity round and that the casing recovered from the area where Respondent was firing a weapon was from a high velocity round, that Mr. Coleman discharged his firearm fifteen feet up the alley where his body was found, Mr. Banks' testimony fits the evidence perfectly and rings true.

Petitioner disparagingly refers to the trial court's reference to these facts as a "convoluted game of 'connect the dots.'" Petitioner's *Brief* at p. 22. A more intellectually honest characterization of what the circuit court did was to evaluate the testimony of Norman Banks in context with evidence already in the record in reaching its conclusion that the after-acquired evidence would produce a new result on retrial.

While Mr. Banks never identified the shooter, he did state to police officers, "*They're* going to kill me!" App. Vol. 2 at p. 167. (Emphasis supplied). "*They*" necessarily conveys the idea that more than one individual was trying to kill Mr. Banks, *i.e.*, Respondent *and* Mr. Saunders.

Moreover, in a stunning omission from its recitation of facts and in its argument, Petitioner makes no reference whatsoever to the fact that a bullet ballistically matched to the one found in Mr. Coleman's body was found next to him – *fifteen feet up the lane* and around the corner. *See, e.g.* App. Vol. 5 at p. 248. At trial, the State sought to explain the presence of this bullet, found around the corner from where Respondent was firing his weapon, as a consequence of "shifting" evidence. App. Vol. 6 at p. 77. While Respondent surmises that this theory advanced by the State to account for physical evidence located at least at a forty-five (45) degree angle from where Respondent was firing a weapon is plausible, it becomes nearly laughable when juxtaposed against the after-acquired evidence of Mr. Banks that substantiates that a second shooter, Mr. Saunders, was in the Lane. Applying Occam's Razor, as the circuit court did, the most

parsimonious explanation for the presence of the bullet found fifteen (15) feet up the lane next to Mr. Coleman's body, one in which Mr. Banks' testimony fits tongue-and-groove with the physical evidence, is that a second shooter was present.

Summarily, the new evidence would *certainly* have a substantial probability of producing a different result at a retrial despite the Petitioner's protestations to the contrary. Indeed, not only an eyewitness, but an actual victim (whom the prosecution, itself, failed to produce at trial) who was shot in the company of the decedent offered evidence unequivocally exonerating Respondent. Such evidence is precisely the type envisioned by this Court in *Frazier* in deciding whether to grant a new trial. Justice demands that Respondent be awarded a new trial.

VIII. CONCLUSION

For the foregoing reasons and any others that may be apparent to the Court, your Respondent, Dallas Michael Acoff, respectfully prays that this Court deny the Petition for Writ of Prohibition prayed for by the State of West Virginia and Honorable Scott R. Smith and for such other relief as this Court deems just and proper.

Respectfully submitted,

DALLAS MICHAEL ACOFF,
Respondent.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-0034

STATE OF WEST VIRGINIA EX REL.
SCOTT R. SMITH, PROSECUTING ATTORNEY, OHIO COUNTY,

Petitioner,

v.

THE HONORABLE DAVID J. SIMS,
JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, AND DALLAS MICHAEL ACOFF,

Respondents.

RESPONDENT, DALLAS MICHAEL ACOFF'S,
RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Petition for a Writ of Prohibition to
the Circuit Court of Ohio County, West Virginia,
Honorable David J. Sims, Judge
Circuit Court Case No. 16-F-43

IX. CERTIFICATE OF SERVICE

Service of the foregoing **Respondent, Dallas Michael Acoff's, Response To Petition For Writ Of Prohibition** was had by delivering true and correct copies thereof to the following persons via First Class U.S. Mail, postage prepaid, to their last known address this 20th day of February, 2018.

Honorable Patrick Morrisey
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